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April 23, 1998

BY HAND DELIVERY

Magalie Salas, Secretary
Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

Re: In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Ms. Salas:

Please find enclosed for filing an original and four copies of the RBOC/GTE/SNET Payphone Coalition's Opposition to Airtouch's and ITA's Appications for Review in the above-captioned proceeding.

Please date-stamp and return the extra copy provided to the individual delivering this package.

Sincerely,

Michael K Kellogg/amp

Michael K. Kellogg

Enclosures

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	))))	CC Docket No. 96-128

THE RBOC/GTE/SNET PAYPHONE COALITION'S OPPOSITION TO APPLICATIONS FOR REVIEW

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April 23, 1998

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

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THE RBOC/GTE/SNET PAYPHONE COALITION'S OPPOSITION TO APPLICATIONS FOR REVIEW

The RBOC/GTE/SNET Payphone Coalition hereby opposes the Applications for Review filed by AirTouch Paging ("AirTouch Application") and by the International Telecard Association ("ITA Application"). The Common Carrier Bureau ("Bureau") rejected AirTouch's Petition for Waiver and the ITA's Petition for Partial Reconsideration in its Memorandum Opinion and Order of March 9, 1998, DA 98-481 ("March 9 Order").

SUMMARY AND INTRODUCTION

Both the AirTouch Application and the ITA Application rest on the same premise: that the Bureau's limited waiver of the requirement that payphones transmit payphone-specific digits in order to qualify for per-call compensation undermines the Commission's Orders requiring IXCs to pay such compensation. This premise is demonstrably false, as the Commission itself has stated. The Bureau's decision to reject AirTouch's and ITA's bid to continue to receive something for nothing was meticulously explained and is unassailable on review.

The Commission requires IXCs to pay compensation for coinless calls because the market cannot, unassisted, provide for fair compensation: TOCSIA prevents payphone service

providers from blocking dial around and subscriber 800 calls, and IXCs therefore have no incentive to pay compensation for such calls. The payphone-specific-digit requirement was adopted to assist the IXCs in tracking compensable calls, but the Commission has never stated that the obligation to pay compensation depends on the universal availability of those digits. To the contrary, in the First Report and Order and in the Order on Reconsideration, the Commission provided that the compensation for independent PSPs would begin immediately, and that compensation for LEC PSPs would begin as soon as LEC PSPs were deregulated. The Commission merely required that the compensation be paid on a per-phone, rather than a per-call, basis, pending the implementation of payphone-specific digits.

The compensation mechanism that the Bureau has adopted for the waiver period is functionally equivalent to the Commission's original interim compensation scheme. IXCs are permitted to pay compensation on a per-phone basis for those phones that are not yet capable of transmitting payphone specific digits.

Claims that the Bureau's waiver policy is inconsistent with the Commission's prior orders, therefore, simply ignore the content of those orders. And they ignore the fact that the Commission's Second Report and Order was issued after the Bureau had determined that the payphone-specific-digit requirement should be temporarily waived for some phones. Thus the Bureau's approach to the technological and logistical problems that the payphone-specific-digit requirement has imposed on LECs, IXCs, and PSPs, has already been endorsed by the Commission.

BACKGROUND

Throughout the payphone proceeding, the Commission has sought to promote market-based pricing for all payphone services. In the case of dial-around and 800 calls, the Commission correctly determined that the market could not function on its own because of legal barriers. TOCSIA prevents PSPs from blocking dial-around and 800 calls, and long distance carriers thus have no incentive to pay PSPs commissions on these calls. The Commission therefore set a default per-call rate to apply in the absence of a negotiated rate.

The Commission's First Report and Order, and its Order on Reconsideration, provided that such compensation would be paid on a per-call basis, but not right away. The Commission determined that "tracking capabilities vary from carrier to carrier." Report and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 20541, 20590, ¶ 96 (1996) ("First Report and Order"). It concluded therefore that "a transition is warranted for requiring carriers to track compensable calls." Id. at 20591, ¶ 99. During that transition period, IXCs would not be excused from their obligation to pay compensation for dial-around and subscriber 800 calls. To the contrary, the Commission required IXCs to pay flat-rate compensation -- or per-phone compensation -- based on the average number of coinless calls generated by a payphone multiplied by the per-call default rate. See id. at 20604, ¶ 125.

At the same time, the Commission determined that to assist IXCs in tracking calls, all payphones would be required to transmit payphone-specific coding digits. See id. at 20591, ¶ 98 ("[E]ach payphone should be required to generate . . . coding digits within the ANI for the carrier to track calls."); Order on Reconsideration, Implementation of the Pay Telephone

Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 21233, 21265-66, ¶ 64 ("Order on Recon.") (to be eligible for per-call compensation, payphones will be required to transmit specific payphone coding digits). It is thus indisputable that the Commission required compensation for coinless calls during the interim period -- albeit on a per-phone, rather than a per-call basis -- even when no PSP was required to transmit coding digits at all.

It eventually became clear that it would be impossible for LECs universally to implement transmission of payphone specific digits by the end of the interim period. The Bureau therefore granted a limited waiver of five months to permit payphones not capable of transmitting such digits nonetheless to receive per-call compensation. See Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 12 FCC Rcd 16387 (1997). The Bureau determined that "[r]efusal to waive this requirement would lead to the inequitable result that many payphone providers . . . would be denied any compensation while implementation issues are being resolved by the industry." Id. at 16390, ¶ 11.

In its Second Report and Order, the Commission noted the problems that LECs had experienced in implementing payphone-specific digits, and implicitly endorsed the Bureau's decision to grant a limited waiver. Second Report and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 13 FCC Rcd 1778, 1781, ¶ 5 (1997) ("Second Report and Order"). The Commission also decided to extend the market-based default rate for two years, "to afford IXCs, PSPs and LECs

the opportunity to adjust to and adequately prepare for" a system of rates based on the local coin rate for each payphone. Id. at 1831, ¶ 122.

On March 9, 1998, the Bureau extended temporarily a limited waiver of the payphone-specific-digit requirements; it noted that "almost 80% of payphones are expected to provide payphone-specific coding digits" by the date of the order, and that the number would continue to increase. The Bureau ruled that "[t]he . . . waiver is crucial to the Commission's efforts to ensure fair compensation for all PSPs." March 9 Order ¶¶ 1, 5.

At the same time, the Bureau rejected requests by several parties -- including AirTouch and ITA -- that they should be relieved of payphone compensation obligations. The Bureau concluded that "[w]e cannot at this late date find that certain parties, although they have continued to use payphones to make subscriber 800 and access code calls, which PSPs cannot block because of statutory limitations, may be relieved of the statutory requirement that there be compensation for these calls as required by Section 276." March 9 Order ¶ 93 (footnote omitted). The Bureau rejected the argument that "the inability to block payphone calls undermines the market-based approach for payphone compensation," noting that "[t]he establishment of a default compensation rate was itself intended, in part, to compensate for any unequal bargaining power arising out of the inability of carriers to block payphone calls." Id. ¶ 94.

The Bureau determined that a waiver of AirTouch's and ITA's compensation obligation would be fundamentally inequitable: "AirTouch and ITA argue that they are unable to block certain calls for which [their] customers must pay compensation. . . . [H]owever, due to statutory constraints, LECs and PSPs are unable to block the use of their payphones by their customers,

and absent a negotiated agreement, the PSPs would not receive compensation." Id. ¶ 96 (footnote omitted). While recognizing that IXCs would be required to pay compensation for calls that they are unable to block, the Bureau found that the potential harm that denial of compensation would inflict on PSPs outweighed any harm to AirTouch, ITA, IXCs, and other payors. Id. ¶ 97. "[D]elaying per-call compensation for AirTouch and ITA would be harmful to other parties and adverse to the public interest because it would deprive PSPs of compensation for subscriber 800 and access code calls." Id. ¶ 98.

On April 3, 1998, however, the Bureau concluded that payphones that are not capable of transmitting payphone-specific digits would not be eligible for per-call compensation after all. Instead, the Bureau decided to "grant IXCs a waiver of the per-call compensation requirement so they may pay per-phone instead of per-call compensation for the payphones for which we granted waivers" of the payphone-specific-digit requirement. Memorandum Opinion and Order, DA 98-642 at ¶ 1 (Apr. 3, 1998) ("April 3 Order"). The Bureau thus adopted a compensation mechanism for the waiver period functionally equivalent to the Commission's original interim compensation plan: payphones that are unable to transmit payphone-specific digits will receive flat-rate, per-phone compensation.

ARGUMENT

In light of the Commission's prior orders, the arguments advanced by AirTouch and ITA in favor of their Applications are frivolous. It is simply incorrect that the Commission's requirement that PSPs receive compensation for coinless calls rests on the assumption that all such calls could be blocked or tracked in real time by IXCs. There is likewise no merit to AirTouch's claim that the Bureau failed to consider changes in circumstances from the

Commission's original Payphone Orders. Neither ITA nor AirTouch presents anything like a convincing case that they are threatened with significant harm as a result of the Bureau's decision. And their accusations that the Bureau's waiver was somehow procedurally improper are wholly untenable: the Bureau explicitly asked for comments on the requests for waivers of the coding digit requirement and responded to all arguments in excruciating detail. The Bureau's decision was faithful both to Congress's mandate and to the Commission's prior orders.

A. The Commission's Decision to Require Compensation Has Never Depended on the Availability of Coding Digits

A review of the Commission's Payphone Orders makes absolutely clear that the obligation to pay compensation for coinless calls has never depended on the universal availability of payphone-specific coding digits. To the contrary, the Commission has repeatedly required that IXCs pay such compensation irrespective of the availability of such digits. AirTouch's and ITA's arguments to the contrary distort the text of the Act and prior Commission orders, ignore the Commission's latest order, and fail even to acknowledge the Bureau's April 3 Order.[1]

As an initial matter, the Act mandates that PSPs be "fairly compensated for each and every completed intrastate and interstate call." 47 U.S.C. § 276(b)(1)(A). Neither ITA nor AirTouch claims that any party is required to pay compensation for any call that is not

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[1]The Coalition pointed out to the Bureau that neither AirTouch nor ITA has any obligation under the Commission's orders to pay compensation; that obligation is unambiguously placed on facilities-based IXCs. See First Report and Order, 11 FCC Rcd at 20584, 20586, ¶¶ 83, 86; Order on Recon., 11 FCC Rcd at 21275, 21277, ¶¶ 88, 92. How -- and whether -- the IXCs pass those charges on is a matter between the IXCs and their customers. In fact, IXCs have been passing along charges far higher than their actual compensation obligations, even as they have failed to honor those obligations. Moreover, if IXCs have failed to implement call blocking capabilities for some payphones -- or await the universal availability of Flex ANI to do so -- this is again a business decision that the IXCs have taken. If AirTouch and ITA's members believe they are hurt by their chosen IXCs' business practices, they should change carriers.

completed; they do not because they cannot. Their calls for a free ride conflict squarely with the congressional command.

Their arguments find no more support in the Commission's orders. Two facts -- both ignored by the applicants here -- prove beyond question that the Commission has always concluded that PSPs are entitled to compensation without regard to the availability of payphone-specific digits. First, in its First Report and Order, the Commission required IXCs to pay compensation for subscriber 800 and access code calls on a flat-rate basis until the expiration of a one-year transition period. That flat-rate compensation was equal to the average number of compensable calls made from payphones multiplied by the default rate of $.35 per call. Thus the Commission could not have believed that the availability of coding digits, and the real-time call blocking and tracking for which those digits are allegedly needed, were a prerequisite to the IXCs' obligation to pay fair compensation.

Second, in its Second Report and Order (ignored by both AirTouch and ITA), the Commission ratified the Bureau's decision to grant a limited waiver of the payphone-specific-digit requirement. See Second Report and Order, 13 FCC Rcd at 1781, ¶ 5. The Commission explained that the default rate -- set in the Second Report and Order at $.284 -- provides for fair compensation, and that the fact that both IXCs and PSPs face "impediments that interfere with the competitive negotiat[ion] process" had necessitated the Commission's involvement. Id. at 1830-31, ¶¶ 121-22 & n.325. Thus the Commission rejected the claim that the payphone-specific-digit requirement was a sine qua non of the obligation to pay compensation.

The Commission has itself confirmed its view in a brief recently filed in the D.C. Circuit. See Brief for the Federal Communications Commission, MCI Telecomm. Corp. v. FCC, No. 97-

1675 (D.C. Cir. Feb. 27, 1998). The Commission noted that the Second Report and Order "set a default rate that provides fair compensation whether or not IXCs have the ability to block calls." Id. at 42. "The Commission set the interim default rate because it recognized that market impediments, such as the unavailability of certain call blocking capabilities, interfere with the competitive negotiation process." Id. (citing Second Report and Order, 13 FCC Rcd at 1831, ¶ 122 n.325). The Commission explained that it was proper to "allo[w] per call compensation to go forward despite a limited waiver of the requirement that certain payphones transmit payphone-specific digits . . . [b]ecause the default per call compensation rate fairly compensates PSPs for calls actually made on their payphones." Id. at 43. "The IXCs and paging companies do not and cannot explain why PSPs -- who themselves may not block access code and subscriber 800 calls -- should provide payphone service for free." Id.

In any event, the Bureau's April 3 Order waives the requirement that IXCs pay per-call compensation for any payphone not capable of transmitting such digits. (Incredibly, Applicants fail even to mention this order.) The Bureau instead permitted IXCs to pay compensation on a per-payphone basis. That decision is functionally equivalent to the Commission's interim compensation plan; the claim that the plan contradicts Commission policy is thus all the more absurd.

AirTouch notes that the Commission has "define[d] fair compensation as where there is a willing seller and a willing buyer at a price agreeable to both." AirTouch Application at 8 (quoting First Report and Order, 11 FCC Rcd at 20568, ¶ 52, and then argues that if AirTouch is an unwilling buyer of payphone services, the compensation it pays must not be fair. Id. at 9. Obviously, this is a non sequitur. AirTouch ignores the fact that the Commission set a default

rate precisely because PSPs must permit the use of their payphones for subscriber 800 and dial-around calls whether or not they are a willing seller; the fact that it is impossible for the parties to negotiate a "price agreeable to both" is what made a default rate necessary in the first place. Indeed, AirTouch is in a far stronger position than PSPs, who are never able to block AirTouch's use of their payphones, inadequate as the PSPs may consider that default compensation to be.

Likewise, AirTouch's effort to bolster its request for a free ride by citing to Section 276 is absurd. As noted, section 276 requires that PSPs be "fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). The fact that AirTouch may be unable to block a call obviously does not mean that fair compensation for such a call is zero. To the contrary, the default rate is intended to provide for fair compensation for each and every completed call, as Congress required. AirTouch's response to this basic point is no response at all.

Applicants' reliance on the Court of Appeals' decision in Illinois Public Telecommunications v. FCC is no more persuasive. The court there noted that "carriers can and will develop blocking technology," 117 F.3d 555, 567 (D.C. Cir. 1997), but this "possibility" did not save the Commission's default rate. Id. at 564. That is because "blocking is hardly an ideal option for the IXCs, for it is . . . expensive to implement . . . [and] its use invariably will result in a mutual loss of business" for IXCs and PSPs. Id. In other words, the court recognized that call blocking was not immediately available, and held that, in all events, the Commission must set a "reasonably justified" default rate. Id. Thus, the claim that the court somehow implied that call blocking was a necessary predicate to the IXCs' obligation to provide compensation, see AirTouch Application at 17, is plainly incorrect.

AirTouch and ITA alike ask the Commission to decide that the Bureau's coding digit waivers "directly undermine Commission policy." ITA Application at 8; see AirTouch Application at 17-19. As the Commission itself has explained to the D.C. Circuit, this claim is flatly wrong. The market-based default rate -- calculated by adjusting the market-determined local coin rate for differences in costs between coin calls and coinless calls -- depended in no way on the availability of call blocking. While it is true that over time IXCs' ability to block calls will give them leverage to negotiate a lower rate for coinless calls, see Second Report and Order, 13 FCC Rcd at 1820, ¶ 97, the default rate is intended to ensure that IXCs pay, and PSPs receive, fair compensation for all calls, no more and no less.[2]

The Bureau's well-articulated decision to reject these arguments, see March 9 Order ¶ 94, is thus unassailable.

B. Applicants Have Failed to Justify Relief

Applicants also claim that the Bureau improperly discounted the harm they will suffer as a result of the payment obligations that IXCs have passed on to them. But neither AirTouch nor ITA presented a convincing case of significant harm.

ITA contends that because of the Commission's limited waiver of LECs' payphone-specific digit obligations, the ITA lacks the ability to identify payphone calls when the call is placed, and that its members will therefore be forced "either to (a) pay for such costs out of their . . . profit margins, or (b) increase rates for consumers of all prepaid calls." ITA Application at 3-

[2]The Coalition in fact believes that the default rate was set too low. See RBOC/GTE/SNET Payphone Coalition Petition for Reconsideration (filed Dec. 1, 1997).

4. This in turn, ITA claims, poses a risk to consumers and to ITA's members; ITA also claims that it is harmed in competition with "ordinary '1+' long-distance services." Id. at 11.

This argument is singularly unpersuasive. As an initial matter, it is an argument that the Commission has already rejected. Indeed, from the start of this rulemaking proceeding, resellers and debit card providers argued that they should be relieved of some of their obligation because they had not accounted for it in cards already issued. First Report and Order, 11 FCC Rcd at 20586, ¶ 87. The Commission rejected the claim:

> [B]ecause Section 276 creates no exceptions for calls facilitated by resellers or debit card providers, such exemptions from the obligation to pay compensation, even on an interim basis, would be contrary to the congressional mandate that we ensure fair compensation for "each and every completed intrastate and interstate call."

Id.

ITA's current plea for special treatment is no more compelling. It is wholly incredible that debit card resellers would simply absorb the costs of per-call compensation passed on to them by the IXCs. They will as a matter of course pass on such charges to their customers; but no company need suffer competitive injury, because all will be similarly situated.[3]

To the extent that debit card providers pass on such charges to their consumers on some basis other than a per-call charge, rates will naturally increase somewhat -- though ITA conspicuously declines to make any estimate of the magnitude of these increases.[4] But those

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[3]ITA's newly minted argument concerning competition with ordinary 1+ services is wholly unsupported by any evidence in the record; the Bureau could not consider the argument (because it was not raised) and the Commission has no reason to give it credence.

[4]The need for across-the-board increases is limited and declining; at the time of the Bureau's initial waiver, 60% of payphones were coding digit capable; by the time of the March 9 Order, that figure had increased to 80% and was growing rapidly.

increases are in all events wholly justified, because the prepaid calling card is useful, in large measure, because payphones are available. The ITA does not and cannot dispute that its members' business depends for its very viability on the widespread availability of payphones. It is thus entirely appropriate that consumers of such services bear a fair portion of payphone costs.

When AirTouch tried to quantify the harm threatened before the Bureau, its own estimates rebutted, rather than strengthened, its claim. It claimed that each of its subscribers would receive, on average, 6-8 unwanted pages from a payphone each month. Taking this figure at face value,[5] the total amount of per-call compensation to be passed through would be between $1.70 and $2.27 per month, hardly a crushing burden. And because AirTouch is no more or less able than any other paging carrier to avoid these compensation obligations, it cannot claim "competitive" harm.[6]

On the other hand, because AirTouch and ITA's members are no differently situated from any other 800 subscriber, to grant their requests for a free ride would essentially deprive PSPs of compensation for all payphones not capable of sending payphone-specific digits. To do so would be contrary to the text and spirit of section 276 and the Commission's Orders.

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[5]In fact, the figure is wholly incredible. It rarely makes sense to page someone from a payphone, because many payphones do not accept incoming calls, and one would in all events be forced to loiter by the phone waiting for the return call. The notion that callers attempt this 20 times a month (with blocking effective 60% of the time) is ridiculous.

[6]The Bureau noted, correctly, that AirTouch chooses to offer callers a blocking option while other paging carriers may not do so. Despite AirTouch's shrill complaints, this does not mean that the Bureau was criticizing that choice: it merely noted, correctly, that AirTouch has various options open to it for recovering its payphone obligations.

C. The Bureau's Decision Was Procedurally Proper

Finally, both AirTouch and ITA attempt to argue that the Bureau's decision was somehow inconsistent with its obligations under the APA. AirTouch claims that the Bureau failed to give its waiver request a "hard look." AirTouch Application at 12-14. ITA insists that the Bureau's decision "present an appearance of potential impropriety" because ITA had inadequate notice and opportunity to comment. ITA Application at 13-15. The first claim is wrong; the second is not only wrong, it is laughable.

The Bureau discussed and refuted AirTouch's arguments in exhaustive detail. See March 9 Order ¶¶ 83-98. There is simply no argument that the Bureau did not air and refute. The Bureau even discussed arguments that had been rejected at least once before in the Bureau's orders denying Petitions for Stay filed by MCI and PCIA. See Memorandum Opinion and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 12 FCC Rcd 20337 (1997); Memorandum Opinion and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 12 FCC Rcd 21872 (1997). The notion that AirTouch's claims did not get a "hard look" is thus fantasy.

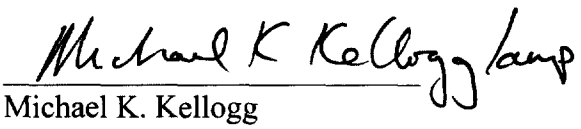
ITA's accusations are yet harder to fathom. In a Public Notice released on October 20, 1997, the Common Carrier Bureau sought comment on waiver requests connected to the coding digit requirement. Those requests raised a broad range of issues connected to coding digits, including a request that that LECs receive "an additional nine months to provide" payphone-specific digits, and another request that the deadline be extended "until the Commission issues an order clarifying the LECs' payphone-specific coding requirements." Public Notice, Pleading

Cycle Established for Petitions to Waive Payphone Coding Digits Requirements, DA 97-2162 (rel. Oct. 20, 1997). If ITA did not comment on these issues, it has only itself to blame.[7]

CONCLUSION

For the foregoing reasons, the Applications for Review filed by ITA and AirTouch should be denied.

Respectfully submitted,



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April 23, 1998

[7]If ITA is objecting to the Bureau's order of October 7, 1997, its objections are of course well out of time.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 1998, I caused copies of the foregoing the RBOC/GTE/SNET Payphone Coalition's Opposition to Airtouch's and ITA's Applications for Review to be served upon the parties on the attached service list by first-class mail.

Marilyn R. Leeland

FEDERAL COMMUNICATIONS COMMISSION
Implementation of the Pay Telephone Reclassification and
Compensation Provisions of the Telecommunications Act of 1996
CC Docket No. 96-128

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